Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 05(RJ)-2–03 OF 2021(W)
TENGKU MAIMUN CHIEF JUSTICE, ZAWAWI SALLEH, ZALEHA YUSOF, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
30 JULY 2021

Civil Procedure — Judgment — Federal Court ('FC') — FC dismissed applicant's appeal for grant of writ of habeas corpus to release him from detention — Applicant moved FC to review and set aside its decision under r 137 of Rules of Federal Court 1995 — Whether applicant had shown that FC's decision was based on point not raised or addressed by the parties in the appeal — Whether applicant was denied opportunity to be heard on point decided by the court — Whether breach of rules natural justice occasioned substantial miscarriage of justice to applicant

On 19 February 2021, the Federal Court, by a 4–1 majority ('the impugned decision') dismissed the applicant's appeal against the High Court's decision to dismiss his application for a writ of habeas corpus to release him from a two-year detention ordered by the chairman of the Prevention of Crime Board ('Board') under the Prevention of Crime Act 1959 ('the POCA'). The applicant had contended that his detention was invalid because, inter alia, the Board was invalidly constituted when the detention order was issued and that s 15B of the POCA was unconstitutional for ousting the jurisdiction of the court to review any act done or decision made by the Board. One of the arguments the appellant took up during the appeal was that there was an infringement of the 'basic structure doctrine' ('BSD') inherent in the Federal Constitution. The applicant had contended that the BSD was recognised and accepted by Malaysian courts as applying to Malaysia. The majority of the court, however, decided that the BSD was not applicable to the Federal Constitution and rejected the doctrine outright. In his instant application, made pursuant to r 137 of the Rules of the Federal Court 1995, the applicant moved the court to review and set aside the impugned decision on the grounds that: (1) a serious breach of the rules of natural justice was occasioned when the impugned decision: (a) decided that the BSD was not part of the Federal Constitution even though both parties to the appeal agreed that it was — that the impugned decision was therefore based on an issue not raised or addressed by the parties and in respect of which the applicant was not given an opportunity to be heard; (b) relied on the Federal Court's decision in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 (where judgment was delivered

after arguments in the applicant's appeal had been presented) without giving the applicant the opportunity to address the judgments that were delivered in that case; and (2) the impugned decision was contrary to judicial courtesy and precedent as it conflicted with the principles set out in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561.

Held, unanimously allowing the review application on ground (1)(a) alone, setting aside the impugned decision and ordering the applicant's appeal to be reheard on a date to be determined:

(1) The court was satisfied on an examination of the majority judgment that the applicant's allegation in ground (1)(a) that a breach of natural justice had occurred, was made out. He had met the high threshold for the review application to be granted (see paras 3, 24 & 44).

(2) It was abundantly clear that the majority judgment did in fact re-examine the doctrinal basis for the BSD and after an extensive analysis of the subject, concluded, inter alia, that the BSD 'which took root in a foreign soil under a distinctly different Constitution ... should not be pressed into use in aiding the interpretation' of the Federal Constitution ('FC'); that the BSD was 'not applicable' in construing the constitutionality of s 15B(1) of the POCA in view of art 159 and that there was 'nothing stated in the FC as to which provision in the FC forms the basic structure'. The majority also did not allude to any suggestion by the respondents in their submissions that the BSD was doctrinally wrong or that it did not exist. In referring the court to cases where the constitutionality of ouster clauses had been upheld, the respondents had invited the court to narrow the scope of the BSD as decided in those cases and not to discard the doctrine entirely. The respondents had also submitted during the hearing of the applicant's appeal that the 'conferral of courts' jurisdiction and powers by federal law was a basic structure of the Constitution'. The respondents therefore proceeded on the basis that the BSD was doctrinally correct and accepted and had even made the case that the BSD had existed since the time of Independence. The minority judgment in the appeal highlighted how the doctrinal existence of the BSD was accepted by the respondents in their submissions (see paras 25–27, 30–31 & 34).

(3) The record showed that the parties were not at variance that the BSD existed in our Federal Constitution. What the parties differed on was whether judicial review remedies formed part of the BSD. It followed that since neither party attempted to revisit the doctrinal basis for the BSD, the majority judgment was clearly formulated on a crucial point

which was not put to the parties in breach of the rules of natural justice, leaving them with no means of redress. As such, a serious miscarriage of justice was occasioned, in particular to the applicant as that crucial point was decided against him. On ground (1)(a) of the review motion alone, the impugned decision ought to be set aside and the applicant's appeal reheard (see paras 37–38).

(4) Ground 1(b) of the review motion was adjunct to ground (1)(a) and therefore did not have to be considered separately. It was not so much that *Maria Chin Abdullah*'s case was relied upon by the majority without parties being invited to address it but that the majority had relied on that case generally to establish the point that the BSD was non-existent in our law (see para 39).

(5) Ground (2) of the review motion was not a legitimate ground to apply for review. The review process was not intended to operate as another tier of appeal. A smaller bench not following precedent established by a larger bench was not per se a ground for appeal although it was a reason to subject the smaller bench's decision to higher scrutiny in a later case. If this was true in the context of appeals, it had to apply with greater force to review motions. Those aggrieved by the decisions of smaller benches should revisit them in later cases. Review motions were not the appropriate recourse (see paras 40–41 & 43).

[Bahasa Malaysia summary

Pada 19 February 2021, Mahkamah Persekutuan dengan 4–1 majoriti ('keputusan yang dicabar') menolok rayuan pemohon terhadap keputusan Mahkamah Tinggi yang menolak permohonannya untuk satu writ haabeas corpus untuk membebaskannya daripada tempoh penahanan selama dua tahun yang diperintahkan oleh pengarah Lembaga Pencegahan Jenayah ('Lembaga') di bawah Akta Pencegahan Jenayah 1959 ('APJ'). Pemohon menghujahkan bahawa penahanannya tidak sah kerana, antara yang lain, Lembaga tidak dibentuk secara sah apabila perintah penahanan dikeluarkan dan bahawa s 15B APJ adalah tidak berpelembagaan kerana mengecualikan bidang kuasa mahkamah untuk menyemak apa-apa perkara yang dilakukan oleh Lembaga. Salah satu hujahan yang dikemukakan oleh perayu sewaktu rayuan adalah bahawa wujud pelanggaran doktrin bentuk asas ('BSD') yang wujud dalam Perlembagaan Persekutuan. Perayu menghujahkan bahawa BSD diiktiraf dan diterima oleh mahkamah malaysia sebagai terpakai di Malaysia/majoriti mahkamah pula, telah memutuskan bahawa BSD tidak terpakai kepada Perlembagaan Persekutuan dan menolak doktrin tersebut sepenuhnya. Dalam permohonan ini, yang dibuat selaras dengan s 137 Kaedah Mahkamah Persekutuan 1995, pemohon memohon kepada mahkamah untuk menyemak dan mengetepikan keputusan yang dicabar atas alasan bahawa: (1) wujud pelanggaran keadilan asasi yang serius apabila keputusan yang dicabar: (a) memutuskan bahawa BSD bukan sebahagian daripada

Perlembagaan Persekutuan walaupun kedua-dua pihak dalam rayuan bersetuju bahawa ianya terpakai — bahawa keputusan yang dicabar adalah berdasarkan isu yang tidak ditimbulkan oleh pihak-pihak dan berkaitan yang mana pemohon tidak diberikan peluang untuk didengar; (b) bergantung kepada keputusan Perlembagaan Persekutuan dalam *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 yang mana keputusan telah diberikan selepas hujahan dalam rayuan pemohon telah dikemukakan) tanpa memberikan peluang kepada pemohon untuk menjawab penghakiman yang dikemukakan dalam kes tersebut; dan (2) keputusan yang dicabar adalah bertentangan dengan ihsan dan perjadian kehakiman kerana ianya bertentangan dengan prinsip yang dikemukakan dalam *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 dan *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561.

Diputuskan, sebulat suara membernarkan permohonan semakan atas alasan (1)(a) sahaja, mengetepikan keputusan yang dicabar dan memerintahkan rayuan perayu didengar semula pada tarikh yang akan ditentukan.

(1) Mahkamah berpuas hati selepas meneliti penghakiman majoriti bahawa pengataan pemohon dalam alasan (1)(a) bahawa pelanggaran keadilan asasi telah berlaku telah dibuat. Dia telah memenuhi taraf yang tinggi untuk permohonan semakan dibenarkan (lihat perenggan 3, 24 & 44)

(2) Ianya adalah jelas bahawa penghakiman majoriti telah meneliti semula asas doktrin BSD dan selepas analisa mendalam dibuat atas perkara tersebut, menyimpulkan, antara yang lain, BSD yang bermula di bumi asing dibawah satu Perlembagaan berbeza tidak patut digunakan untuk membantu penafsiran Perlembagaan Persekutuan ('PP') bahawa BSD tidak terpakai dalam menafsir keperlembagaan s 15B(1) APJ mengambil kira perkara 159 dan tiada apa-apa yang dinyatakan didalalam PP berkenaan dengan peruntukan mana dalam PP membentuk bentuk asas. Majoriti juga tidak menyatakan kepada apa-apa cadangan responden dalam hujahannya bahawa BSD adalah salah secara doktrin atau ianya tidak wujud. Apabila merujuk mahkamah kepada kes yang mana keperlembagaan klausa pengecualian telah dikekalkan, responden menjemput mahkamah untuk mengecilkan skop BSD seperti yang diputuskan dalam kes tersebut dan bukan untuk mengetepikan doktrin tersebut keseluruhannya. Responden juga menghujahkan sewaktu pendengaran bahwa rayuan perayu adalah bahawa pemberian bidangkuasa mahkamah dan kuasa oleh undang-undang persekutuan merupakan satu bentuk asas Perlembagaan. Responden oleh itu meneruskan atas dasar bahawa BSD adalah betul secara doktrin dan terpakai dan turut membuat hujahan bahawa BSD wujud sejak merdeka lagi. Penghakiman minoriti dalam rayuan mengetengahkan bagaimana

kewujudan doktrin BSD diterima oleh responden dalam hujahan mereka (lihat perenggan 25–27, 30–31 & 34).

(3) Rekod menunjukkan bahawa pihak-pihak tidak bertentangan bahawa BSD wujud dalam Perlembagaan Persekutuan. Apa yang pihak berbeza pendapat adalah sama ada remidi semakan kehakiman membentuk sebahagian daripada BSD. Ini adalah kerana tiada pihak cuba untuk menyemak semula asas doktrin untuk BSD, penghakiman majoriti adalah jelas dibuat atas isu penting yang tidak diletakkan kepada pihak-pihak yang melanggar peraturan keadilan asasi, yang tidak memberikan mereka peluang untuk tebus rugi. Oleh yang demikian satu kegagalan keadilan telah berlaku, secara khususnya kepada pemohon kerana isu penting tersebut telah diputuskan dengan tidak memihak kepadanya. Atas alasan (1)(a) usul semakan sahaja, keputusan yang dicabar harus diketepikan dan rayuan permohon didengar semula (lihat perenggan 37–38).

(4) Alasan 1(b) usul semakan adalah tambahan kepada alasan (1)(a) dan oleh itu tidak perlu dipertimbangkan secara berasingan. Ianya bukan sekadar kes *Maria Chin Abdullah* diletakkan kebergantungan kepada oleh majoriti tanpa pihak-pihak dijemput untuk berhujah berkaitannya tetapi bahawa majoriti telah bergantung kepada kes tersebut secara umum untuk menyatakan fakta bahawa BSD tidak wujud dalam undang-undang kita (lihat perenggan 39).

(5) Alasan 2 usul semakan bukan satu alasan sah untuk memohon untuk semakan. Proses semakan tidak bertujuan untuk berfungsi sebagai satu lagi peringkat rayuan. Satu barisan hakim yang lebih kecil tidak mengikut duluan yang diwujudkan oleh barisan hakim yang lebih besar bukan alasan untuk rayuan walaupun ianya merupakan alasan untuk meletakkan keputusan barisan hakim yang lebhih kecil untuk diteliti dalam kes yang akan datang. Sekiranya ini adalah benar dalam konteks rayuan, ianya perlu memakainya dengan lebih tegas untuk menyemak usul. Mereka yang terkilan dengan keputusan barisan hakim yang lebih kecil harus menyemak mereka semula dalam kes kemudian. Usul semakan bukanlah jalan penyelesaian yang sesuai (lihat perenggan 40–41 & 43).]

Cases referred to

Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417, FC (refd)
Cheah Cheng Hoc v Public Prosecutor [1986] 1 MLJ 299, SC (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, FC (refd)
Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2021] 6 CLJ 1, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)

Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals [2021] 1 MLJ 478; [2021] 1 CLJ 631, FC (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (refd)

Legislation referred to

Federal Constitution arts 4(1), 121(1)
Prevention of Crime Act 1959 ss 7B, 7B(2), 15B 15B(2)(ba), 19A(1)
Rules of the Federal Court 1995 r 137

Gopal Sri Ram (Preakas Sampunathan, Ravin Jay, Yasmeen Soh and Karluis Quek with him) (Preakas & Partners) for the applicant.
Shamsul bin Bolhassan (Muhammad bin Sinti and Liew Horng Bin with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Tengku Maimun Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] Enclosure 1 is an application pursuant to r 137 of the Rules of the Federal Court 1995 to review and set aside the order of this court dated 19 February 2021.

[2] The applicant is one Nivesh Nair a/l Mohan ('detenu') whose case stems from an application for habeas corpus which was dismissed by the High Court. On appeal to this court, the order of the High Court was upheld on 19 February 2021 by a majority of 4–1. This court delivered two written judgments — one on behalf of the majority ('majority judgment') and the other the dissenting judgment ('minority judgment').

[3] After carefully considering parties' written submissions and upon hearing their oral submissions, we were satisfied that the high threshold of review was made out and as such, we unanimously allowed encl 1.

[4] We now provide our reasons for the said decision.

[5] Unless expressed otherwise, our references to 'section/sections' is to those of the Prevention of Crime Act 1959 ('the POCA 1959') and likewise, 'Article/Articles' is to those of the Federal Constitution.

SALIENT FACTS

[6] The detenu was detained for a period of two years pursuant to a detention order issued by the Chairman of the Prevention of Crime Board

('Board') dated 6 May 2019 under sub-s 19A(1). He then filed an application for habeas corpus alleging that the detention was ultra vires and bad in law and that accordingly, he ought to be released by order of the court.

[7] The primary basis of his allegation of ultra vires is premised on sub-s 7B(2). The subsection, as we understand it and without having to set it out, stipulates that members of the Board shall hold office for a period not exceeding three years unless re-appointed. According to the detenu, the non-compliance was borne out by the fact that the first respondent did not reply to the detenu's averments/question as to the validity of the appointments of certain members of the Board who ordered his two-year detention.

[8] As a corollary to the s 7B issue, the detenu also challenged the constitutional validity of s 15B which reads:

> 15B Judicial review of act of decision of Board
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> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
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> (2) In this Act, 'judicial review' includes proceedings instituted by way of —
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> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
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> (b) an application for a declaration or an injunction;
>
> (ba) a writ of habeas corpus; and
>
> (c) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act.

[9] Put simply, s 15B is an ouster clause which the detenu argued is constitutionally invalid for being in violation of cl (1) of art 4 and cl (1) of art 121. More specifically, para (ba) of sub-s 15B(2) statutorily debars any court from hearing any application for a writ of habeas corpus.

[10] Now, given the nature of the arguments, the principal issue is the validity of the detention of the detenu under s 7B of the habeas corpus. However, before that question could be dealt with, the preliminary question that arose was whether the application for habeas corpus is itself sustainable in light of the statutory bar against challenge imposed by s 15B.

A THE REVIEW MOTION

[11] As this was a motion for review and not an appeal, we do not consider it necessary to discuss in great detail the decisions of the courts below on the merits. We shall proceed to highlight the basis for the review motion.

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[12] The grounds in support of encl 1 were as follows:

(1) There is a serious breach of natural justice in the following instances:

C (a) Both parties agreed that the basic structure doctrine is part of the Federal Constitution. The Federal Court ruled otherwise without affording the applicant a right to be heard on this issue. The present matter was thus decided by the Federal Court based on an issue not raised nor addressed by parties.

D (b) The Federal Court relied on *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750, which is a judgment delivered after arguments in the appeal were herein presented. The applicant was not afforded an opportunity to address the judgments in *Maria Chin Abdullah*. There is therefore a breach of the rules of natural justice.

E (2) The decision of the Federal Court is contrary to judicial courtesy and precedent as it conflicts with the principles set out in *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545, and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561.

F

[13] For convenience, we shall refer to the first ground of challenge as the 'natural justice point' and the second ground, the 'judicial courtesy point'.

The law generally

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[14] The law on review is trite having been repeated *ad nauseam* in numerous judgments. Out of those many judgments, it is sufficient that we refer to only two of them, namely, *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2021] 1 MLJ 478; [2021] 1 CLJ 631 ('Yong Tshu Khin') and
H *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2021] 6 CLJ 1 ('Anwar Ibrahim').

[15] In respect of the general rule on review based on the allegation of breach of natural justice, this court recently observed in *Yong Tshu Khin* that:

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> [81] The ratio gleaned from the case is that a subsequent panel of the court need not have to examine its prior decision with a microscope to confirm that parties were accorded every opportunity to be heard on every microscopic point. Suffice to say that parties are allowed to canvass before the court each point striking to the substance of the case and that the court, in applying its own judicial mind and

> resources arrives at a decision on the law and on the facts of the case as submitted. It is one thing to say, on one side, that what was submitted was one thing but what was decided was something completely different and on the other, that while addressing the main issues (such as the leave questions), the court also found the need to address some other issues. Surely, the powers of the Federal Court as the apex court cannot be viewed so narrowly as to exist in a vacuum or be altogether pigeonholed into specific boxes only to be examined later under a magnifying glass whether such decision strayed from the confines of the perimeters so artificially established.

[16] The passage to an extent establishes the standard that the applicant must meet to make out a claim that there was a breach of natural justice. Elsewhere in the same judgment, this court also explained further that in addition to proving that breach, the applicant must also be able to establish that the breach of natural justice occasioned a substantial miscarriage of justice (see: [93]–[99] of *Yong Tshu Khin*).

[17] As such, the judgment in *Anwar Ibrahim* is germane. It is the most recent judgment of this court to set aside a prior order of its own, on the ground of breach of natural justice. In finding that there was a breach of natural justice, this court through Harmindar Singh Dhaliwal FCJ said:

> [73] Nonetheless, it seemed to us that in the end, at least as evident in the majority judgment, the whole matter evolved into a consideration of whether the applicant had the standing to bring the action since he had not shown how he was adversely affected in the sense that he had a real and genuine interest in the subject matter. This was in effect, as noted by the majority, the test of locus standi and was intertwined with the question of whether there was a real and actual controversy. In the end, the majority held the applicant had not satisfied this test and, in declining to answer the constitutional questions, decided that the questions posed were abstract, academic and hypothetical.
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> [74] As was required of us, and as evident in the preceding segment, we had taken great pains to ascertain with precision as to whether the complaints by the applicant of a breach of natural justice had any merit. In this respect, it is at least clear to us that on the issues decided by the majority, the applicant was not given notice as well as the opportunity to answer the issues of whether the constitutional questions were academic and his locus standi to bring the action. In the circumstances, we were persuaded that a case for breach of natural justice had been made out by the applicant in that the audi alteram partem rule had not been observed. That, however, is not the end of the matter.

[18] Further into that judgment, this court analysed whether the breach of the right to be heard had occasioned injustice and whether the matter ought to be reheard on the facts. This court found that those requirements were met.

[19] To be clear and to our understanding, *Anwar Ibrahim* was not a case

where all the substantive arguments were addressed but that other complementary or subsidiary points were also addressed to arrive at the final outcome. Instead, the case shows that it was decided on an entirely distinct point upon which all parties were not invited to address and which otherwise left the appellant with no means of judicial redress. The high threshold of review was therefore made out, the original order was set aside, and a rehearing was ordered as the only form of redress considered possible.

Application of the law to the facts

The natural justice point

[20] In the present application, the detenu adopts a line of argument very close to the one taken in *Anwar Ibrahim*. Here, during the appeal, the detenu argued that s 15B is unconstitutional because it violates the pre-amendment cl (1) of art 121 and cl (1) of art 4. To advance this point, the detenu further argued that the post-amendment cl (1) of art 121 is unconstitutional as it violates the doctrine of basic structure ('BSD').

[21] The detenu also submitted that the respondents in this case proceeded on the basis that recent judgments of this court judicially recognised the BSD. In other words, counsel for the detenu argued that both parties were on common ground that the BSD doctrinally exists but that they only differed as to the extent of its application as regards the constitutional validity of s 15B.

[22] The detenu argued that despite the narrow compass within which the submission was framed and responded to by opposing counsel, this court on its own volition undertook to traverse through and unravel the jurisprudential theory anchoring the existence of the BSD. In other words, the court, on its own motion, found that the BSD is not our law.

[23] To prevent miscomprehension, the case here does not concern the substantive correctness or tenability of the applicant's argument on the merits. Instead, the applicant's complaint is that both parties had proceeded on the basis that the BSD was accepted in our law but disagreed as to the extent of its application. Yet, as alleged, the court found that the BSD did not exist in the first place and the question of its application did not even arise.

[24] We examined the majority judgment of this court on this issue and we were satisfied that the allegation by the detenu that a breach of natural justice had occurred, was made out. The following when viewed collectively, established the breach.

[25] Firstly, it is abundantly clear from the majority judgment that the majority judges did in fact re-examine the doctrinal basis for the BSD. After an extensive analysis on the subject, the majority concluded as follows:

> [194] One must bear in mind of the dangers of relying on concepts/theories which had developed mostly in foreign countries, as they evolved from the historical, social and political context of foreign nations. *The basic structure concept which took root in an alien soil under a distinctly different constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own FC*. There is a need for deeper analysis of the rationale and specific historical background which underpins such foreign doctrines, no matter how popular it may seem. The basic structure concept was accepted by the courts in India at the material time due to the political and social climate surrounding the composition of the executives and the judiciary at that time which was only peculiar to India then. Such is not the situation in this country.
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> [195] The adoption of the basic structure doctrine would create a situation that although Parliament had followed the procedure in amending the laws as stated in Article 159, nevertheless the courts can strike it down, if in the opinion of the courts that the amending law struck at the basic structure of the FC. Hence, the court will declare that Parliament has no power to amend that particular Article when Article 159 FC allows it, if the correct procedure is followed. Does that not seem like the courts are over and above the FC, thus going against what Article 4(1) provides?
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> [196] *Hence, to sum up, on point no (iv): given the aforesaid, the basic structure doctrine is not applicable in construing the constitutionality of section 15B(1) of POCA in view of Article 159. There is nothing stated in the FC as to which provision in the FC forms the basic structure.* To challenge the constitutionality of section 15B of POCA, it has to be tested against any of the provisions of the FC, not against the concept of basic structure. Section 15B of POCA derived its force of law and validity from Article 149 of the FC. It cannot be said that section 15B oust the courts from exercising its powers under Articles 4(1) or 121 (1) of the FC. The courts can exercise its supervisory judicial powers in cases where there is non-compliance of procedural requirement. Neither can it be said to contravene Article 4(1) and to that extent contravenes the 'basic structure' of the FC. (Emphasis added.)

[26] Next, we contrasted the legal findings of the majority to the summary of the respondents' submission which is summarised in paras 24–37 of the majority judgment. Most pertinently, the majority did not allude to any suggestion by the respondents that BSD is doctrinally wrong or most fundamentally, that it does not exist. The closest observations to this effect are as follows:

> [34] Guided by the consistent judgments of this Court in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90, *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & Another Appeal* [2002] 3 MLJ 72; [2002] 4 CLJ 105, *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81, *Abdul Razak Baharuddin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445, *Chuah Kian Voon v Menteri*

Dalam Negeri, Malaysia & Ors [2020] 1 MLJ 351; [2020] 1 CLJ 747 at p 740, *Hemanathan all Kunjraman v Menteri Dalam Negeri, Malaysia Dan Tiga lagi* 05(HC)-172–07 of 2019 the respondents submitted that the contention of the appellants that s 15B of POCA is unconstitutional is without merits. The aforesaid decisions of the Federal Court dealt with the issue of the constitutionality of ouster clauses similar to s 15B of POCA and it has been consistently established by this court through those cases that the ouster clauses are not unconstitutional.

[35] There is a presumption of constitutionality in every legislation passed by Parliament. The burden to prove otherwise, lies on the party who present the challenge (Refer to *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; [1994] 1 LNS 208). This presumption of constitutionality issue is addressed at paras 68–74 of this judgment.

[36] The respondent submitted that the trilogy of cases, *Semenyih Jaya*, *Sivarasa Rasiah* and *Indira Ghandi* referred to by the appellant can be distinguished on its facts and issues involved and hence cannot be held in support of the contention by the appellants.

[27] The cases referred to in para 34 are cases where the courts have previously upheld ouster clauses. As for the cases in para 36 and as we understood it, the respondents referred to them to make the point that those cases did not rule that ouster clauses are constitutionally invalid. The respondents attempted to distinguish those cases on the facts and not so much on the broad principle. At best, it was an invitation to narrow the scope of the BSD as decided in those cases rather than to discard the doctrine entirely.

[28] The third indication of breach of natural justice is the plain language of the submission by senior federal counsel ('SFC') for the respondents. For clarity, vide their revised submission dated 9 July 2021 in respect of the review motion, the respondents argued that:

6.2 ... the Respondents expressly invited the court to revisit the concept of 'basic structure' enunciated in the trilogy of cases ie *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* (see para [4]–[5] Respondents' Submissions dated 15.06.2020)'. In the course of oral submissions, the Respondents expanded the argument in full by referring the court to historical documents showing the real intention of the framers of the Constitution. The arguments of the Respondents were approved and endorsed by the majority judgment at para [50]–[54]. In any event, 'even if the parties were in consensus that the doctrine is applicable or otherwise, [the Federal Court] is not entirely precluded from considering and ultimately deciding on the issue before it' (*Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 per Hasnah Hashim FCJ at [272].

The net effect of the Respondent's argument, which was again approved by the majority at para [196] is that 'it is not the basic structure that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision.

Neither can it be said to contravene Article 4(1) and to that extent contravenes the 'basic structure' of the FC (see para [17] Respondents' Submissions dated 15.06.2020).

[29] The above paragraphs when read in isolation might appear to suggest that the respondents did contest the existence of the BSD. However, in para 6.2 and 6.3 above, the respondents refer to their submission dated 15 June 2020 and how they claim to have expanded it in their oral submission before the original panel specifically paras 4–5 thereof. However, a perusal of the submission dated 15 June 2020 tells a different story and we set it out below:

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4. It is submitted that: (i) *conferral of courts' jurisdiction and powers by federal law is a basic structure of the Constitution*; (ii) the entrenched practice of courts' jurisdiction and powers being prescribed by federal law does not violate the doctrine of separation of powers; (iii) limiting the scope and extent on remedies available for enforcement of rights by federal law does not impinge on judicial power.

5. The Respondents seek to persuade this Honourable Court, in the course of the following submissions, on the three (3) points outlined above by undertaking a detailed study of the drafting records and minutes to ascertain the real intendment of Article 121 of the FC. These crucial documents were regrettably unavailable to counsel as well as judges in *Semenyih Jaya* (2017), *Indira Gandhi* (2018), *Alma Nudo* (2019), and *JRI Resources* (2019). (Emphasis added.)

[30] In para 4 of the respondents submission dated 15 June 2020, the respondents quite unequivocally submitted that the 'conferral of courts' jurisdiction and powers by federal law is a basic structure of the Constitution'. Further, if one reads the header to that part of the submission together with para 4, the respondents essentially outlined their submission in that way which further cements the point that they proceeded on the basis that the BSD is doctrinally correct and accepted.

[31] To drive the point further, the respondents even appear to have made the case that the BSD has existed since the time of Independence but that the detenu was attempting to overstretch it. This is what the respondents submitted in para 12 of the written submission dated 15 June 2020:

12. *The 'basic structure' inherent in the judicial set-up then was that jurisdiction and powers conferred unto a court were matters purely within the legislative powers of the Federation*. The scope and extent of jurisdiction and powers of courts, with the exception of the Supreme Court whose jurisdiction was expressly conferred by the principal instrument, were determined by federal law. (Emphasis added.)

[32] With the greatest of respect, we found baffling and in defiance of candour that the respondents took the position during the hearing of the

review motion that it was always their case that the very jurisprudential existence of the BSD ought to have been revisited. As can be gleaned from their submissions, read as a whole, that was never the case (both in their written and oral submissions).

[33] During the course of the hearing, learned SFC Liew Horng Bin attempted to convince us that the respondents did invite this court to re-evaluate the doctrinal basis of the BSD and, to this extent, Liew SFC insisted that he took us through each paragraph of his submission dated 15 June 2020 to convince us of that point. After taking us through those paragraphs, he then concluded that the 'net effect' of his submission before the appellate panel was that the doctrinal basis of the BSD should be re-examined. When we queried SFC as to the clear language of his submission from the paragraphs above-cited, and how they clearly suggest that the respondents accepted the existence of the BSD, SFC Liew's response was that those passages 'say what they say'.

[34] Further, we did not lose sight of the fact that there was a minority judgment and that the dissenting judge highlighted how the doctrinal existence of the BSD was accepted by the respondents in their submissions. For convenience, we reproduce the relevant paragraphs of the minority judgment:

> The Respondents' Submissions on the Constitutional Validity of Section 15B POCA
>
> [43] SFC Shamsul Bolhassan responded to the appellants' submission also by reference to the renowned trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. He accepted that judicial power is vested in the High Court and that Parliament cannot amend those constitutional provisions that comprise a part of the basic structure of the FC.
>
> [44] However he pointed out that in the context of the six appeals here relating to POCA, there was an entirely different legislative regime in place. POCA was one of a series of special laws relating to preventive detention enacted pursuant to art 149 FC. This was to be contrasted with the legislation in the trilogy of cases of which dealt with general laws enacted pursuant to art 74.
>
> ...
>
> The Submissions of the AG in Maintaining that s 15B POCA is Constitutional
>
> [87] SFC Liew Horng Bin began his comprehensive submissions on behalf of the Attorney-General on this aspect by accepting and outlining the position in law as enunciated in the trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*:
>
> (a) Judicial power is enshrined in the High Courts under art 121 FC. The rule of law and the separation of powers denoting the independence of the Judiciary are fundamental features of the basic structure of the FC. The

inherent judicial power of the civil courts under art 121 FC is 'inextricably intertwined' with their constitutional role to provide a check and balance mechanism as envisaged by the FC;

(b) Parliament does not have the power to amend the FC to the extent of undermining its fundamental or basic features such as the doctrine of separation of powers and the independence of the Judiciary ...

(c) The courts can ensure that Parliament does not destroy the basic structure of the FC. While the FC does not expressly refer to the doctrine of a basic structure, what it means is that a statute is open to judicial scrutiny for violations of the provisions of the FC, ...

(d) Judicial power cannot be removed from the Judiciary and equally cannot be conferred on other bodies in the absence of the constitutional safeguards afforded to an independent Judiciary; ...

(e) ...

(f) The FC is interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles comprising the structure of the FC ...

[88] The learned SFC submitted that in order to comprehend the meaning and content of the rule of law in the Federal Constitution, it is of relevance to study the history and background of art 4(1) FC. That takes us back to the original draft of the FC, ...

[89] In relation to judicial power it was reiterated, on behalf of the AG, that Parliament *could* limit the remedy issued by the Courts in the form of judicial review of habeas corpus, by confining any challenge as to constitutionality of a statutory provision, to procedural compliance of an impugned decision.

[90] As the learned SFC put it, the issue was whether it comprises a basic structure of the FC that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision. This in turn called into question whether it was a basic structure of the FC that the Judiciary enjoys unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by way of judicial review.

[35] We directed the attention of learned SFC Shamsul and Liew to the above paragraphs and they accepted that the minority judgment's summarisation of the respondents' submission was correct.

[36] We pause for a moment here to note that our case law is replete with reminders to advocates — whether from the Bar or public service — of the onerous duties of those in the legal profession. The highest duty of counsel — a duty which supersedes his or her duty to his client — is his duty to the court, which remains paramount in the administration of justice. Counsel are expected to make out their client's case to the best of their abilities but they cannot adopt the mindset that they must 'win at all costs' if that results in misleading the court or approbating and reprobating before different panels of

the court. See generally for example: *Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299 at p 301.

[37] We found, as learned SFC Liew said, that the respondents' submission dated 15 June 2020 indeed says what it says and that parties were not at variance that the BSD exists in our Federal Constitution. What parties were at variance was whether judicial review remedies form part of the BSD. It follows that since neither party attempted to revisit the doctrinal basis for the BSD, the majority judgment was clearly formulated on a crucial point which was not put to parties in breach of the rules of natural justice leaving them with no means of redress. As such, a serious miscarriage of justice has occasioned, in particular to the detenu as that crucial point was decided against him.

[38] For the foregoing reasons, we found that ground (1)(a) of the review motion was of merit and on that point alone, we were satisfied that the prior order of this court dated 19 February 2021 ought to be set aside and the appeal reheard.

[39] As for ground (1)(b), with respect, we considered the detenu's reliance on *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 ('Maria Chin') to be adjunct to ground (1)(a). It is not so much that the case itself was relied on without inviting parties to address it but that the majority relied on *Maria Chin* generally to establish the point that the BSD is non-existent in our law. We did not therefore have to consider this point as a separate point.

The judicial courtesy point

[40] Having resolved the review motion on ground (1)(a), we did not find it necessary to consider ground (2) — the 'judicial courtesy point'. Be that as it may it was our considered view that ground (2) is not a legitimate ground for review.

[41] This court observed in *Yong Tshu Khin* that the review process is not intended to operate as another tier of appeal (see: *Yong Tshu Khin*, [78]).

[42] The point on judicial courtesy and *stare decisis* were addressed in the minority judgment of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('Zaidi bin Kanapiah'). After referring to the timeless observations of this court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, it was stated thus in *Zaidi bin Kanapiah*:

> [33] ... Firstly, strictly speaking within the context of our written law, there is no difference in law between a judgment delivered by a smaller bench or a larger bench. This may be inferred from s 77 of the CJA 1964 which provides that 'proceedings

shall be decided in accordance with the opinion of the majority of the Judges comprising the Court'. In terms of written law therefore, the number of judges from case to case does not strictly matter. This is because the majority judgment of the court generally becomes law and binding precedent in all subsequent cases. It is not therefore a ground per se to overrule a subsequent decision of the smaller bench which had departed from the larger bench.

[34] Be that as it may, the second portion of the passage establishes that the number of judges from case to case is nonetheless relevant in terms of the principles of stare decisis — a principle followed assiduously by our courts for nearly a century though it is not expressly contained in our written law. Viewed from this angle, the above dictum of Peh Swee Chin FCJ suggests that the strength and size of a bench in a previous case is one relevant factor when determining whether or not that previous decision ought to be followed in a subsequent case.

[35] Minimally, the non-compliance of a smaller bench of the same court in a subsequent case to a decision of the court delivered by a larger bench in the previous case goes to judicial integrity and courtesy. *Dhalip* explained the circumstances in which the apex court ought to depart from its previous decisions which is an exercise not governed by the FC or statute. While it is true that there is no legal basis in written law to hold a smaller bench to the decision of a larger bench in a previous decision, it is a matter of stare decisis and judicial policy aimed at preserving public confidence in the Judiciary.

[43] A smaller bench not following precedent established by prior larger bench is not per se a ground of appeal though it is a reason to subject the decision of the said smaller bench to higher scrutiny in a later case. If this is true in the context of appeals, then it must apply with greater force to review motions. In fact, it has been established that a plain error of law and nothing more (per se per incuriam decisions) do not satisfy the threshold for review. See: *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417. In sum, those aggrieved by the said decisions should revisit them in later cases. Review motions are not the appropriate recourse.

CONCLUSION

[44] For the reasons aforesaid, we were satisfied that the detenu has met the high threshold of review and we accordingly allowed encl 1 on ground (1)(a) alone. We set aside the order of this court dated 19 February 2021 and we ordered the appeal to be reheard on a date to be determined.

Order accordingly.

Reported by Ashok Kumar